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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. A-342

STEPHEN ECONOMY,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1973

No. A-342

STEPHEN ECONOMY,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, Stephen Economy, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 16, 1973.

OPINION BELOW

The Court of Appeals for the Second Circuit did not render an opinion nor did the District Court for the Eastern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 16, 1973. This Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

An application for an extension of time to file this petition was timely made and permission was granted extending the time to do so through and including October 15, 1973.

QUESTION PRESENTED

Was the evidence sufficient to warrant the petitioner's conviction for knowing possession of goods stolen from interstate commerce?

STATEMENT OF THE CASE

The petitioner, Stephen Economy, was charged by indictment with knowing possession of stolen goods and conspiring to do so. He was tried before Judge John Dooling and a jury in the United States District Court for the Eastern District of New York. The petitioner was convicted only on the charge of possession. He was sentenced to imprisonment for three (3) years, all but six (6) months of which was suspended and placed on probation for five (5) years.

On August 16, 1973 the judgment was affirmed without opinion by the United States Court of Appeals for the Second Circuit.

The petitioner has been released on his own recognizance by way of a personal bond in the amount of Twenty-Five Thousand ($25,000.00) Dollars.

STATEMENT OF FACTS

The petitioner together with Joseph Cardillo and Emilio Jovino proceeded to trial before Judge John F. Dooling and a jury in the United States District Court for the Eastern District of New York.

The proof as adduced by the government in support of the indictment can, as applicable to the appellant, be synthesized in the following narration.

Joseph Martorana testified that he had previously twice been convicted of a crime, *i.e.*, buying stolen meat and possessing a concealed weapon.

He stated that he had earlier in the day entered a plea of guilty to the conspiracy count of the indictment and related that he knew each of the defendants on trial.

Martorana narrated that on July 19, 1972, he was employed as a truck driver and during the course of his duties arrived at Pier 39 on the Brooklyn waterfront. While there he met Emilio Jovino who asked him whether he would be "interested in taking a load out, I could make some money." Martorana responded by asking "What's in it for me?" Jovino was then alleged to have respondent "Don't worry about it, you will be taken care of, . . . you can make a good buck on it." (D.App. 89a-91a).*

Thereupon Martorana and Jovino loaded the truck with crates containing the cigarette lighters. The former drove the truck off the pier and he then asked Jovino what he was going to do with it. The latter replied that he would meet him at the 39th Street Diner. However, he did not do so. Martorana continued to make deliveries (D. App. 92a-99a).

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*The prefix "D. App." refers to the petitioner's appendix heretofore filed.

On the following date he telephoned Jovino and told him that he was at *Joy's Pub*, and inquired as to what he was to do with the freight that had remained on his truck. He was told "Don't worry about it. It will be taken care of. Just wait there." (D. App. 119a).

Thereafter the petitioner arrived, asked whether he had the lighters, and upon receiving an affirmative response was told to wait, "*I might have a buyer for you,*" and then *departed.* (D. App. 123a).

The petitioner then returned with an unidentified individual, a conversation ensued and *Economy gave Martorana a card.* He then told him to "*Bring the merchandise to this place. The money is good.* You will get it tomorrow. Don't worry about it. It is guaranteed, the money." (D. App. 125a).

Thereupon Martorana drove to the designated place, *i.e.*, the Surprise Shop at Court and Union Streets, entered, inquired as to the whereabouts of the owner, and was directed to the co-petitioner Joseph Cardillo. Martorana told him that he had fifteen cases for him and was told that it was to go down the cellar.

They then began to take the cases off the truck. While so doing Martorana received a telephone call. Martorana, Cardillo and Economy, who was in a luncheonette across the street, were then arrested. (D. App. 144a-151a).

Raymond Schackett, the vice-president of E & S Friedman Associates, Baldwin, New York, then testified as to the shipment coming from Japan to Baldwin and introduced various shipping documents with respect thereto.

Charles Dugan, a special agent for the Waterfront Commission of New York Harbor, testified that on July 20, 1972, he was maintaining surveillance of Martorana's truck. While so

doing he observed the petitioner and an unknown male park, enter Joy's Bar and immediately thereafter drive away. Later in the day they returned to the Bar, then left the bar in the Company of Martorana, converse, and the Petitioner and the unknown male again departed.

Agent Dugan further related that he followed Martorana's truck to the Surprise Shop, and saw the petitioner enter a candy store across the street therefrom.

Samuel Chambers, also a special agent for the Waterfront Commission, testified that immediately prior to arresting the petitioner he overheard him making a telephone call and saying, "The cops are here." (D. App. 401a).

The Government thereupon rested and the petitioner then moved for a directed judgment of acquittal. The application was denied as to the substantive count with the Court holding that there was "enough to put him at least in joint possession of the load with Jovino call it constructive possession if you will." (S.M. 476).*

However, the motion to dismiss was granted as to the conspiracy count with the Court saying, "I just feel that it would be speculating as to his knowledge of the interstate shipment." (S.M. 486).

The petitioner testifying on his own behalf stated that he was a longshore checker duly licensed by the Waterfront Commission of New York Harbor. That on July 20, 1972, he did meet Joseph Martorana at a bar who inquired whether he desired the company of a prostitute. After declining the same, the petitioner returned to the pier.

Later that day he returned to the bar in connection with a

*The prefix "S.M." refers to the stenographic minutes of the trial.

retirement party for several co-employees. He then left the bar to visit his mother, returned and met Martorana outside the bar who asked him to solicit for him. Thereafter he returned to the pier and at the close of the working day went to the union hall. However, prior to entering he stopped to telephone his wife and while so doing was arrested.

The petitioner stated that he had never prior to his arrest, seen either Jovino or Cardillo or even been in the latter's shop. He further denied ever having seen the card which he was alleged to have given to Martorana or written on the back thereof.

The petitioner specifically denied ever having had a conversation with Martorana as to fifteen cases of cigarette lighters, or ever having been shown them or where Martorana could take them.

John Libretti, James Martyn and Robert J. Martyn, fellow employees corroborated the petitioner's testimony as to the conversations with Martorana.

The petitioner rested and the Government called Robert E. Walsh, an agent of the Waterfront Commission in rebuttal. He corroborated the earlier testimony that the petitioner and an unknown male had on July 20, 1972 entered and left the bar, and that later that day Economy entered Joe's luncheonette.

At the conclusion of the entire case the petitioner again moved for a directed judgment of acquittal. The Court in denying the motion said: "He has constructive possession or nothing. If he hasn't got constructive possession, no case against him." (S.M. 1108).

The Court charted the jury that the government did not introduce evidence that the petitioner "ever actually touched any of the crates of lighters." It also instructed the jury that one can also have legal possession without having immediate

physical control of an article if one has the power to control and dispose of its possession." (D. App. 1241a).

Exception was taken by the petitioner as to that portion of the charge which set forth that:

> "The third essential element is that the defendant whose case you are considering knew when he received or was in possession of the cigarette lighters that they were stolen goods. Again, the government need not present direct proof of what was in defendant's mind, but it must prove facts and circumstances from which you are able to infer beyond a reasonable doubt that the defendant knew that the goods were stolen. Possession of goods recently stolen, unless that possession is explained, is in itself evidence from which you may, but you are not required to, infer that the defendant so having possession knew that the goods were stolen." (D. App. 1243a).

The cause was submitted to the jury which returned a verdict of guilty as to the petitoner. A motion to set aside the verdict for a new trial as well as a renewed application for a judgment of acquittal were made and denied.

REASON FOR GRANTING THE WRIT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO WARRANT THE PETITIONER'S CONVICTION FOR KNOWING POSSESSION OF GOODS STOLEN FROM FOREIGN COMMERCE.

Section 659 of Title 18, United States Code, provides in part that whoever buys or receives or has in his possession any such goods or chattels constituting an interstate shipment, knowing the same to have been stolen, shall be deemed to have violated said statute.

No proof was ever adduced as to buying, selling, or physical possession by the petitioner and the government thus relied upon a purported constructive possession. In so doing it failed to establish either dominion or control but at best actions which tended to infer a facilitation of the disposal of the goods.

There is no conflict with the proposition that at this appellate juncture the evidence must be reviewed in a light most favorable to the government. *Glasser v. United States*, 315 U.S. 60 (1942). Yet that evidence, even when so viewed, does not establish that dominion and control sufficient and necessary to create construtive possession of the fifteen (15) crates of lighters. For possession means actual care, control and management. It does not mean a flittering about, acting as a conduit, dependent upon others, lacking power and incapable of altering a pre-arranged succession of events.

Veritably, there being no actual possession, it was necessary for the government to establish that constructive possession which was held in *United States v. Casalinuovo*, 350 F.2d 207, 209 (2nd Cir. 1965) to be "such a nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it

were actual possession.'"

It is submitted that the proof of dominion and control necessary to show such possession has simply not been demonstrated. *United States v. Nitti*, 444 F.2d 1056, 1059 (7th Cir. 1971).

Indeed the government has proven naught but peripheral presence and the petitioner's status as a messenger. Admittedly it did not establish actual possession of the stolen crates. Indeed the petitioner's acts carry no legitimate, rational or reasonable inference that he was engaged in an independent, specialized function sufficient to constitute dominion and control.

This Court in *United States v. Romano*, 382 U.S. 136 (1965), in holding that presence carried no inference of the crime of possession, stated at 141:

> "Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. But presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engated in one of the specialized functions connected with possession, rather than in one of the supply, delivery or operational activities having nothing to do with possession. Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt — 'the inference of the one from proof of the other is arbitrary . . .' *Tot v. United States*, 319 U.S. 463, 467, 87 L.Ed. 1519, 1524, 63 S.Ct. 1241."

The Second Circuit itself held in *United States v. Vilhotti*, 452 F.2d 1186 (2nd Cir. 1971) at 1188, that:

> "It is well settled that in order to justify a conviction for receiving or possessing stolen goods under Section 659, the

> . . . government must establish that the defendants exercised dominion or control over the goods."

Pointedly it had held earlier in *United States v. Kearse*, 444 F.2d 62 (2nd Cir. 1971), that the defendant's mere presence but six feet away from 40 cartons of stolen merchandise which practically filled a small living room was an insufficient basis to warrant a conviction for possession under Section 659. The Court made clear that the defendant's momentary presence prior to arrest was legally insufficient to establish any degree of knowledge in the absence of which there could be no dominion or control.

Parenthetically it has also been held that a defendant's mere presence as the driver of an automobile carrying a passenger who had possession of narcotics was insufficient to attribute possession to said defendant. *United States v. Steward*, 451 F.2d 1203 (2nd Cir. 1971).

In shore, there was simply that paucity of evidence needed to warrant a conviction. Predicated upon that evidentiary insufficiency, the trial court should have granted the application for a judgment of acquittal. Its failure to do so constituted reversible error.

POINT II

THE PETITIONER INCORPORATES BY REFERENCE THE POINTS SET FORTH IN THE BRIEF OF THE CO-PETITIONER, JOSEPH CARDILLO.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

THEODORE KRIEGER
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of August one thousand nine hundred and seventy-three.

Present: HON. WILLIAM H. MULLIGAN, HON. JAMES L. OAKES, HON. WILLIAM H. TIMBERS, Circuit Judges,

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73-1579 — 73-1740

United States of America,
Plaintiff-Appellee,

v.

Joseph Martorana, Joseph Cardillo, Stephen Economy, and Emilio Iovino,
Defendants,

Joseph Cardillo, Stephen Economy,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

by: VINCENT A. CARLIN,
Chief Deputy Clerk

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 30 1974
MICHAEL RODAK, JR., CLE

Nos. 73-645 and 73-651

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH CARDILLO, PETITIONER

v.

UNITED STATES OF AMERICA

STEPHEN ECONOMY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-645

JOSEPH CARDILLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-651

STEPHEN ECONOMY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner Cardillo contends that the evidence was insufficient to show that he joined the conspiracy, and petitioner Economy contends that the evidence was insufficient to support his conviction for knowing possession of goods stolen from interstate commerce. Both petitioners contend that the instructions did not require the jury to find that they had actual knowledge that the goods were stolen, and that the prosecutor's trial tactics were prejudicial.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner Cardillo was convicted of possessing goods stolen from interstate commerce, knowing them to have been stolen, and of concpiracy to commit that offense, in violation of 18 U.S.C. 659 and 371. Petitioner Economy was convicted of the Section 659 possession offense. Each petitioner was sentenced to three years' imprisonment, with all but six months suspended, and placed on probation for five years.[1] The court of appeals affirmed without opinion (Pet. App.).

Joseph Martorano testified at trial that on July 19, 1972, he and Emilio Iovino[2] stole fifteen crates of imported Japanese cigarette lighters from Pier 39, Brooklyn, New York (Tr. 84-95). The lighters were placed on Martorano's truck, and it was agreed that he would wait at a diner across the street from the pier until Iovino told him where to take them (Tr. 95-97). Iovino failed to contact Martorano that day, but on July 20, 1972, he told Martorano to wait at Joy's Pub, a bar about three blocks from the 39th Street Pier (Tr. 97-103). Shortly thereafter, petitioner Economy entered that bar and asked Martorano if he had the lighters. When he replied affirmatively, Economy told him to wait there because he might have a buyer, and then left the bar (Tr. 104-123). About five or ten minutes later, Economy returned with an unidentified individual. Economy handed Martorano a business card, told him to bring the crates to the address on the card, and

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[1] Petitioner Cardillo received identical, concurrent sentences on each of the two counts on which he was convicted.

[2] Martorano pleaded guilty prior to trial and testified for the government at trial. Iovino was tried with petitioners and acquitted.

assured Martorano that he would be paid (Tr. 124-126, 366-370, 1082-1084). Martorano then drove his truck loaded with the stolen crates to the address on the card—the Surprise Shop, Inc., Union and Court Streets, Brooklyn, New York, petitioner Cardillo's place of business (Tr. 144, 370-371, 1084, 1087-1088).

When Martorano arrived at the store he parked his truck in front, entered the store, and asked for the owner. He was directed to petitioner Cardillo. He introduced himself to Cardillo, showed Cardillo the card which Economy had given him and told Cardillo that he had fifteen crates for him. Cardillo told him to put the crates in the cellar and went outside and opened the cellar door. Martorano, Cardillo and a boy who worked for Cardillo began unloading the crates. After a couple of crates had been unloaded, Martorano was informed that there was a phone call for him, and he re-entered the Surprise Shop. Economy was the caller, and he told Martorano that the cops were all around (Tr. 144-146). Meanwhile, Waterfront Commission agents, who had been maintaining surveillance on Martorano's truck that day, observed Economy park across the street from the Surprise Shop, look up and down the street for several minutes and then enter a nearby luncheonette. An agent followed him into the lucheonette, observed him making a telephone call, and heard him telling the other party on the telephone that the cops were there (Tr. 372-378, 400-402, 1088-1089).

1. There was sufficient evidence to show that Economy had possession of the stolen goods (Economy Pet. 8-10). While the evidence does not show that Economy had actual possession of the goods, it does show that he exercised such dominion and control over their disposal that he had constructive possession of the contraband.

See *United States* v. *Casalinuovo*, 350 F. 2d 207, 209 (C.A. 2). On July 20, 1972, Economy ascertained from Martorano the location of the stolen merchandise. He directed the delivery of the goods and assured the driver that he would be paid for his services. He followed the contraband to its destination, spotted the watching authorities, and alerted his accomplices to the danger. This evidence was sufficient to show that Economy exercised dominion and control over the goods. See *United States* v. *Carneglia*, 468 F. 2d 1084, 1087 (C.A. 2); *United States* v. *Marquez*, 462 F. 2d 620, 621 (C.A. 9).[3]

2. The evidence was sufficent to show that Cardillo joined the conspiracy (Cardillo Pet. 13-16).[4] Martorano testified that, at Joy's Pub, Economy stated that he might have found a buyer for the lighters. Shortly thereafter, Economy gave him Cardillo's business card and told him to deliver the lighters to that address and to ask for the owner. He further told Martorano that payment was guaranteed. When Martorano presented the card to Cardillo and stated that he had fifteen cases, Cardillo immediately indicated that he knew what Martorano was talking about by directing him to put the merchandise in the cellar without seeking any indication as to what the crates might contain. Cardillo then proceeded to open the cellar door and to assist in

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[3] *United States* v. *Romano*, 382 U.S. 136, on which petitioner Economy relies, is inapposite. It involved the statutory inferences to be drawn under 26 U.S.C. 5601(b)(1) from mere presence at an illegal distilling site and did not consider the inferences which can permissibly be drawn from an individual's possession of recently stolen goods.

[4] Although Economy adopts Cardillo's contentions (Economy Pet. 10) this point is inapplicable to him, since Economy was not convicted of conspiracy.

moving the cases inside the shop. During the unloading, Cardillo presumably saw the shipping markings on the crates signifying their foreign origin, but at no time did Cardillo ever ask to see any shipping documents or inquire as to the contents of the crates. This evidence was sufficient for the jury to infer that petitioner Cardillo knew the contents and stolen nature of the crates and thus had knowingly joined the scheme to dispose of the contraband. Moreover, Cardillo's contention that the other conspirators would have delivered fifteen crates of cigarette lighters valued at $90,000 (Tr. 325) to him without his knowledge or consent was obviously not believed by the jury.[5]

3. Petitioners' contention (Cardillo Pet. 16-19, Economy Pet. 7, 10) that the instructions failed to charge the jury that they must find actual knowledge that the lighters were stolen is without merit. On the requisite knowledge element, the court charged as follows (Cardillo Pet. 18):

> The third essential element is that the defendant whose case you are considering knew when he received or was in possession of the cigarette lighters that they were stolen goods. Again, the government need not present direct proof of what was in the defendant's mind, but it must prove facts and circumstances from which you are able to infer beyond a reasonable doubt that the defendant knew that the goods were stolen. Possession of goods, recently stolen, unless that possession is explained, is in itself evidence from which

[5] Petitioner Cardillo does not challenge the sufficiency of the evidence supporting his conviction on the substantive possession count, on which he received a concurrent sentence. See *Barnes* v. *United States*, 412 U.S. 837, 848.

> you may, but you are not required to, infer that the defendant so having possession knew that the goods were stolen.

This instruction clearly and correctly charged the jury that they must find that the defendants actually knew that the lighters were stolen, and petitioners suggest no reason to believe that the jury disregarded those instructions.[6]

4. Petitioners' claim of prosecutorial misconduct (Cardillo Pet. 9-13; Economy Pet. 10) is insubstantial. The contention is that certain questions asked by the prosecutor concerning one Emmanuel Mangano were prejudicial. However, Mangano's name was first introduced by petitioner Cardillo during his direct testimony (Tr. 533), in which he explained that Mangano was both a joint owner of the Surprise Shop and a co-worker with Economy on the Brooklyn piers. In closing argument the defense argued that the unidentified man at the meeting at Joy's Pub could have been Mangano, and that the lighters might have been delivered to the Surprise Shop at his instigation rather than Cardillo's. Thus, it was the defense rather than the prosecution who attempted to interject Mangano into the case. Moreover, petitioners concede that no objection was made at trial to the questions which petitioners now assign as error.

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[6] Petitioners' reliance on *United States* v. *Fields*, 466 F. 2d 119 (CA. 2), is misplaced for, contrary to the charge here, there the jury was instructed that the government need not prove that the defendant knew the property was stolen but need only adduce evidence which tends to prove knowledge.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.